that there was no specific covenant for interest. On the other hand Haji Salleh took the profits of the land. By English law interest is payable upon mortgage debts eventhough it is not expressly reserved, unless there is either an express or implied stipulation to the contrary. Here there is no deed, but I think that the right of Haji Salleh to take the profits would negative any claim to interest. And the circumstances of the transaction seem to me to indicate that no interest is payable; this is supported, if what Mr. Zehnder says is correct, by the reluctance of *Naning* Malays to stipulate for interest as being forbidden by Mohammedan law.

I think therefore that the order of the Resident Councillor should be varied, and that the land should be transferred to Isam binte Mohamed Syed and Alang binte Lebar as tenants in common upon payment by them to Haji Salleh of the sum of $65.50. No costs are asked for, and I make no order as to costs.

Order varied accordingly.

Solicitors: *Zehnder Brothers.*

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[45]

F.M.S. REPORTS

In Re LEONG AH HENG
OFFICIAL ASSIGNEE v. HO CHOO

[O.C.J. (Howes J.) September 19, 1935]

[Perak Bankruptcy No. 19 of 1935]

Bankruptcy Enactment, 1912, s.46(i) — Fraudulent preference — "With a view to giving a preference" — Dominant motive of transferor being to do what he is bound or compelled to do.

Whether a transfer of property is made in favour of a creditor with a view to giving such creditor a preference over other creditors is one of fact. The question to be determined is whether the dominant motive actuating the debtor in making the transfer is a desire to prefer the particular creditor or was it of a different character? As a solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

Where the dominant motive actuating the debtor was that in making the transfer, he was only doing what he felt himself bound or compelled to do, the transfer is not void as against the Official Assignee.

Sime, Darby & Co. Ltd. v. *Official Assignee,* A.I.R. 1928 P.C. 77 followed.

Lewis for the applicant.

Coomarasamy for the respondent.

Cur. Adv. Vult.

The facts appear sufficiently from the judgment.

Howes J.: On 15th January, 1934, the bankrupt who was carrying on the business of a cycle dealer in Ipoh under the name of Hock Leong Hin Tong Kee, wrote to the respondent, Hoo Choo as follows:—

"As I have settled account with you for the sum of $5,000 for which I have given you an I.O.U. for $5,000 of even date, I hereby authorise you to remove from my shop, Hock Leong Hin Tong Kee at any time, goods to the value of $7,500 as collateral security without let or hindrance."

The bankrupt had been borrowing money from the respondent since 1928, and the above document was given to show the position of affairs between her and the respondent on 15th January, 1934. The bankrupt admitted that she used some of the money in paying off previous loans from other people, in the expenses of her daughters' marriages, and for domestic expenses. A little of it was used in her cycle business, but no entry as regards this was made in her books of the business.

She admitted that since 1932 her business had been run at a loss; and it is clear that on the date of this document the bankrupt was unable to meet her liabilities.

Prior to 12th April, 1935, the respondent demanded repayment, and on that day he sent the bankrupt a notice requiring her to pay the $5,000 due on the I.O.U. within 24 hours from receipt of the notice "otherwise action will be taken against you to take possession of the goods from your premises to recover the above money and any subsequent expenses that may be incurred in connection therewith."

On 14th April, 1935, the respondent came to the bankrupt's premises and removed goods to the value of $5,036. A document was prepared in Chinese, purporting to represent a sales receipt for the goods removed, as though the transaction had been a cash sale, and acknowledging payment by respondent of $5,036. In fact, no money passed on this occasion, except the $36.

The bankrupt, in her evidence, stated that she knew the letter of the 15th January, 1934, was connected with her debt to the respondent and was security for it; and when she received the notice she thought she was bound by the letter, and that was why she delivered the goods to the respondent.

On the 17th April, 1935, the bankrupt filed her petition in bankruptcy; and on the 26th April, 1935, she was adjudicated bankrupt.

The question in this case is similar to that in the case of *Sime, Darby & Co., Ltd.* v. *Official Assignee of the Estate of Lee Pang Seng,* A.I.R. 1928 P.C. 77, viz.: Was the transfer of these goods to the respondent made "with a view of giving such creditor a preference over the other creditors" within section 46(i) of the F.M.S. Bankruptcy Enactment, 1912, and therefore to be deemed fraudulent and void as against the Official Assignee? As was stated in the above case:

"The question to be determined is one of fact: Was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the infernce properly to be drawn from the circumstances attending the transfer as established by the evidence."

There can be no doubt that the bankrupt, when she gave the respondent the letter on 15th January, 1934, was under the impression that it was some sort of legal security for the debt. Nor can there be any

doubt that, at the date of the actual transfer of the goods, the bankrupt must have contemplated her bankruptcy, since she filed her petition three days later.

[46] [46] The law as to fraudulent transfers was considered at some length by Warrington L.J. in the case of *In re Cohen; Ex parte Trustee,* [1924] 2 Ch. 515, 536 in which he quoted Lord Esher M.R. in *New, Prance & Garrard's Trustee* v. *Hunting,* [1897] 2 Q.B. 19, 27:—

"The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a prefernce, but also on the state of mind of the person who made it. It must be shown, not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention,' or 'view,' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors."

At p. 537 the learned Lord Justice, after quoting another case stated:

"I think these passages in themselves establish that it is for the trustee to make out some case that the payment was with a view to preferring the creditor, and the mere fact that the payment results in prefernce is not enough."

In the present case, what I have to endeavour to do, is to decide from the evidence, what was the dominant motive which actuated the bankrupt to transfer the goods, and whether she can be said to have given the preference to the respondent "voluntarily."

She is a woman of little education, and cannot be expected to know the niceties of the law relating to bankruptcy. Even if her action may appear to have been voluntary, it is capable of explanation, as for instance where the preference was caused by pressure, fear or the like.

In *Buckley's* case, [1899] 2 Ch. 725 it was held that a moral obligation towards a particular creditor was not sufficient to justify a preference in fact, but here, although the letter of the 15th January, 1934, which the bankrupt had given may have been valueless in law, I think there can be no doubt that she was under the impression that she had given the respondent some sort of security for the loan.

In delivering the goods, the bankrupt was under the same apprehensions of legal process, as if the respondent had actually threatened her. She knew that by the letter she had authorised the respondent to remove goods to the value of $7,500 (if he so desired) "without let or hindrance." She then received the notice of 12th April, 1935, written in English, and which necessarily had to be translated to her (possibly with embellishments) containing the words "otherwise action will be taken against you to take possession of the goods from your premises to recover the above money and any subsequent expenses that may be incurred therewith."

In my view, to an ignorant woman, this was clearly a threat of legal proceedings, and the subsequent delivery of the goods was not a voluntary act, but an act under pressure, however groundless the threat of legal proceedings may have been.

In this case, I consider, [as was found in the case of *Sime, Darby & Co., Ltd.* v. *Official Assignee, supra*] the dominant motive actuating the debtor was that in making the transfer, she was only doing what she felt herself bound or compelled to do.

For this reason the motion must be dismissed with costs.

Motion dismissed.

M. KANNABHIRAN v. R. M. MUTHIAH PILLAY

[A.C.J. (Thomas C.J.) December 7, 1935]

[Pahang Collector's Civil Appeal No. 2 of 1935]

The Land Code, 1926, s.142 — Powers of Collector.

In determining the amount due under a charge under section 142 of the Land Code, 1926, the Collector has no power to determine extraneous matters, such as a question of the right to recover damages for negligence.

If the Collector is satisfied, after hearing the reasons advanced by the chargor, that cause has been shown he should stay further hearing of the application until such reasonable time as will allow the chargor to take any action he pleases with regard to such extraneous matters.

Storr for the appellant.

Tan Teow Bok and *Cumarasami* for the respondent.

Cur. Adv. Vult.

Thomas C.J.: This is an appeal from a decision of the Collector of Land Revenue, Raub. The appellant is the registered transferee of a charge of certain lands in the E.M.R. Sementan Ulu. The charge was in the form contained in Schedule XXIV(a) of the Land Code, 1926.

The terms of the charge not having been complied with, proceedings were commenced under the provisions contained in section 141 *et seq.* of the Land Code, 1926. Section 142 is as follows:—

"If after hearing the application the Collector is satisfied that default has been made in any particular as aforesaid, and if no cause be shown to his satisfaction, he shall by order in the Form in Schedule XXXII determine the amount due under the charge and order the sale of the land charged or of such portion thereof as he may tihnk fit, and thereupon the chargee shall deposit the duplicate memorandum of charge with the Collector."

[47] [47] At the hearing before the Collector the chargee admitted having collected certain rents arising from the property charged in accordance with an agreement entered into with the chargor when proceedings had been previously taken in 1930. The chargor disputed that the rents had been correctly accounted for, and asked for an adjournment to enable him to obtain his papers which were with his papers which were with his lawyer.

An adjournment was granted. At the adjourned hearing, seemingly no further evidence was taken. There would appear to have been arguments by advocates to the effect that the chargee had been guilty of negligence in collecting the rents, and that he should be made to account for all sums which might have been received, whether in fact received or not.